Supreme Court, U.S.
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No. 02-463

In The
Supreme Court of the United States

ALS SCAN, INCORPORATED,

Petitioner,

v.

DIGITAL SERVICE CONSULTANTS, INCORPORATED,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Reply to Brief in Opposition

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REPLY BRIEF OF PETITIONER

The Brief in Opposition to *certiorari* wrongly argues that this case does not present any clear or important question of law worthy of the Court's consideration and, therefore, this Court's intervention is clearly not called for at this time. (Brief Opp. 4, 5). Furthermore, the brief contends that the issue presented, how minimum contacts should be considered in the context of the Internet, should be allowed to "percolate" in the lower courts. (Brief Opp. 16).

Regrettably, this issue has been percolating for at least six years,[1] leaving confusion in its wake and no consensus in sight.[2] As the "Report on Global Jurisdiction Issues Created by the Internet" points out; "the lack of clarity in lower court opinions in the [United States] simply reflects the lack of clarity in a doctrine that is highly fact specific."[3] Even the Fourth Circuit seemed to hint that "the due process concepts of personal jurisdiction" need to be rearticulated by this Court "in light of technology advances." (Pet. App. 12)

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[1] *See Inset Systems, Inc. v. Instruction Set, Inc.*, 937 F. Supp. 161 (D. Conn. 1996)(the first reported decision on the issue).

[2] *See e.g., Yahoo! Inc v La Ligue Contre Le Racisme Et L'Antisemitisme* 145 F. Supp 2d 1168 (N.D. Cal 2001) and 169 F Supp 2d 1181 (N.D. Cal 2001).

[3] Am. Bar Ass'n Global Cyberspace Jurisdiction Project, Achieving Legal and Business Order in Cyberspace: A Report on Global Jurisdiction Issues Created by the Internet ("Global Cyberspace Jurisdiction Project") at p. 51-52 (July 10, 2000), at http://www.abanet.org/buslaw/cyber/initiatives/draft.rtf

It has been fifteen years since this Court's last personal jurisdictional foray in which it found "that the placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State." *Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102 (1987). There is no question that an Internet Service Provider specifically publishes and/or "places" information on the Internet and, as the Australian High Court recently reasoned,[4] online publishers know what the Internet is capable of when they publish.[5]

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[4] On December 10, 2002, the Australian High Court handed down a well-reasoned opinion on jurisdiction in *Dow Jones & Co. Inc. v. Gutnick*, 2002 AUST HIGHCT LEXIS 44 – a claim for defamation for online publication. The court held:

> In the case of material on the World Wide Web, it is not available in comprehensible form until downloaded on to the computer of a person who has used a Web browser to pull the material from the Web server. It is where that person downloads the material that the damage to reputation may be done. Ordinarily then, that will be the place where the tort of defamation is committed.

Id. at 34. *Cf. United States v. Thomas*, 74 F.3d 701, 707 (1996).

[5] However broad may be the reach of any particular means of communication, those who make information accessible by a particular method do so knowing of the reach that their information may have. In particular, those who post information on the World Wide Web do so knowing that the information they make available is available to all and sundry without any geographic restriction.

Dow Jones & Co. Inc. at 30-31.

Three days after Australia's highest court ruled that Dow Jones could be sued for defamation in Australia over articles from Barron's magazine that were posted on the Internet in the United States, the Fourth Circuit, relying on the standard articulated in this case, ruled that Virginia lacked jurisdiction to hear a prison warden's claim of libel, where articles published by two Connecticut newspapers on their Web sites, implied that the warden was "a racist who advocates racism." *Young v. New Haven Advocate*, 2002 U.S. App. LEXIS 25535. As these two recent cases highlight, this Court's intervention is clearly called for at this time.

In this case, not only did Respondent Digital Service Consultants, Inc. ("Digital") know that it was publishing throughout the world, it specifically knew that it was publishing copyrighted photographs belonging to a Maryland corporation and, thereby, causing harm in Maryland. Additionally, it steadfastly refused to respond to repeated demands that it stop the publication of the photographs; providing the requisite "something more" that was lacking in *Asahi*. (Pet. App. 36-43).

The *Zippo* Model.

The brief opposing *certiorari* argues that "the Tenth Circuit and the District of Columbia Circuit have both cited *Zippo*[6] with approval and followed its reasoning." (Brief Opp. 13). In fact, while no other Circuit Court (except the Fourth Circuit) has expressly adopted the *Zippo* model, most commentators have specifically

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[6] *Zippo Manufacturing Co. v. Zippo Dot Com, Inc.*, 952 F. Supp 1119 (W.D. Pa 1997).

criticized it. Because of *Zippo*, courts have become "clearly . . . convinced that the nature of a defendant's web site is relevant to the jurisdictional issue, but a failure to articulate why it is relevant makes it difficult to determine where the jurisdictional line should be drawn in cases that fall between Zippo's two extremes."[7] Interestingly, "no other country has focused on the degree of a site's interactivity in assessing jurisdiction."[8]

The Digital Millennium Copyright Act of 1998 ("DMCA").

Inexplicably, the Brief in Opposition claims that the DMCA effectively renders this issue moot and, therefore, a review by this Court "will not be helpful to the development of the law." (Brief Opp. 5). Equally bizarre is the assertion that "Petitioner's claims against Digital were brought under the [DMCA]." (Brief Opp 2). This is simply untrue and there is no evidence in the record to support such a statement. There has also been no evidence introduced that Digital has met any "safe harbor requirements" under the DMCA. (Brief Opp. 17). Rather, it is clear that Digital had knowledge of the copyright infringement (Pet. App. 36-43), but took no action to terminate "its relationship with Alternative" and/or terminate "Internet access to Alternative." (Brief Opp. 2, fn. 1). Therefore, Section IV of Digital's Brief in Opposition is unsupported, irrelevant, and, as such, need not be considered by the Court.

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7 Global Cyberspace Jurisdiction Project at p. 57.

8 *Id.* at 58.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant the Petition for Writ of Certiorari to afford all parties the opportunity to fully and adequately brief this timely and significant issue.

Respectfully Submitted,

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